Federal Court  Cour fédérale

Date: 20160712

Docket: IMM-3198-15

Citation: 2016 FC 771

St. John's, Newfoundland and Labrador, July 12 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

DAMILOLA OGUNDIPE, MICHELLE ADEDIRAN (MINOR), EMMANUEL ADEDIRAN (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Damilola Ogundipe (the "Principal Applicant"), Ms. Michelle Adediran and Mr. Emmanuel Adediran (collectively the "Applicants") seek judicial review of the decision, dated June 11, 2015, of the Immigration and Refugee Board, Refugee Appeal Division (the "RAD") confirming the decision of the Immigration and Refugee Board, Refugee Protection Division (the "RPD"), refusing their refugee claim.

[2] The Applicants are citizens of Nigeria. They sought protection, pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), on the grounds that the Principal Applicant's former partner would force her to marry him and subject all the Applicants to "barbaric rituals in furtherance of his political ambition".

[3] The RPD rejected their claim in a decision dated February 3, 2015 on the basis that the Applicants had viable internal flight alternatives.

[4] In presenting their appeal to the RAD, the Applicants submitted new evidence and requested an oral hearing, pursuant to subsections 110(4) and 110(6) of the Act, respectively. The new evidence they sought to introduce consisted of an unsigned affidavit of Akanni Ayoola, and news articles from online publications dated February 1, 2015 and February 13, 2015.

[5] The RAD accepted the affidavit of Akanni Ayoola since it was dated after the RPD's rejection of the claim. However, the RAD did not give the affidavit any weight because it was unsigned.

[6] The RAD found that the new articles describe events that predate the rejection of the Applicants' claim and did not accept them.

[7] The RAD found that the new evidence admitted under subsection 110(4) did not raise a serious issue with regard to credibility, was not central to the RPD's decision and did not justify allowing or rejecting the claim. Accordingly, no hearing was held.

[8] The RAD found that the three internal flight alternatives, identified by the RPD, were reasonable. It agreed with the RPD's finding that the Applicants would not face a serious possibility of persecution in Nigeria for a Convention ground, and would not be personally subjected to a risk to their lives or of cruel and unusual treatment or punishment, or a danger of torture.

[9] Subsequent to the hearing of this application for judicial review on February 3, 2016, the Federal Court of Appeal delivered its decision in *Minister of Citizenship and Immigration v. Singh*, 2016 FCA 96. Pursuant to a Direction issued on April 1, 2016, the parties were given the opportunity to comment on the application of that decision in this matter. The Applicant filed submissions on April 12, 2016. The Respondent filed submissions on April 18, 2016.

[10] The Applicants raise five issues in this application for judicial review.

[11] First, the Applicants submit the RAD misapplied subsection 110(4) of the Act by failing to give the Ayoola affidavit any weight and by rejecting the news articles. They argue that the affidavit would have been valid in Nigeria and as such it should have been given more weight by the RAD; see the *Canada Evidence Act*, R.S.C. 1985, c. C-5, subsection 54(2). They also submit that the RAD failed to consider whether they could have reasonably been expected to present the news articles at the time of their rejection.

[12] Second, they argue that the RAD erred by failing to hold an oral hearing.

[13] Third, they contend the RAD did not conduct an independent assessment of their claim.

[14] Fourth, the Applicants submit the RAD's decision with respect to the internal flight alternatives is unreasonable.

[15] Finally, they argue that the RAD did not assess the risk to the minor Applicants and its reasons in that respect are inadequate.

[16] The Minister of Citizenship and Immigration (the "Respondent") submits that the RAD correctly applied subsection 110(4) of the Act and its decision was reasonable.

[17] The Respondent also argues that the Principal Applicant's affidavit sworn August 4, 2015 and filed in support of the within application should be given no weight since it contains improper argument.

[18] The first issue to be addressed is the applicable standard of review.

[19] The appropriate standard of review for this Court when reviewing a decision of the RAD is reasonableness; see the decisions in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 at paragraph 35 and *Singh*, *supra* at paragraph 29.

[20] In order to meet the reasonableness standard, the reasons offered must be justifiable, transparent, intelligible and fall within a range of possible, acceptable outcomes; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[21] The next issue to be addressed here is the weight to be given to the Principal Applicant's affidavit. In my opinion, the Respondent's objection is well founded. The Principal Applicant's affidavit contains improper legal argument at paragraphs 7 to 9, 12 to 16 and 21 to 26 and these paragraphs will not be considered.

[22] The third issue to be considered is the RAD's application of subsection 110(4) of the Act.

[23] Subsection 110(4) of the Act provides as follows:

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[24] The Federal Court of Appeal in *Singh*, *supra* said at paragraph 49 that the decision in *Raza v. Canada (Citizenship and Immigration)* (2007), 289 D.L.R. (4th) 675 (F.C.A.) applies to consideration of "new evidence":

> Subject to this necessary adaptation, it is my view that the implicit criteria identified in *Raza* are also applicable in the context of

> subsection 110(4). For the reasons set out above, I am not satisfied that the differing roles of the PRRA and the RAD, and the separate status of persons who perform these functions, are sufficient to set aside the presumption that Parliament intended to defer to the courts' interpretation of a legislative text when it chose to repeat the same essential points in another provision. Not only are the requirements set out in *Raza* self-evident and widely applied by the courts in a range of legal contexts, but there are very good reasons why Parliament would favour a restrictive approach to the admissibility of new evidence on appeal.

[25] The scope for the introduction of new evidence before the RAD is narrow and the "basic rule" is that the RAD must proceed on the basis of the record before the RPD; see *Singh*, *supra* at paragraph 51.

[26] In my opinion, the RAD should have accepted the news articles. The article published on February 1, 2015 describes an event that took place on January 31, 2015. The Applicants' hearing was held on January 26, 2015 and the decision was issued on February 3, 2015.

[27] Given that the Applicants were in Canada at the time, they could not have been reasonably expected to present the article in the three days between the date of the event and the date of decision.

[28] The second article, published on February 13, 2015, was published after the RPD rendered its decision. It was equally unreasonable for the RAD to find that this article did not constitute "new evidence".

[29] The RAD made a reviewable error by failing to admit the articles as new evidence. It is not necessary to deal with the other arguments raised by the Applicants.

[30] In the result, this application for judicial review is allowed and the matter is remitted to a differently constituted panel of the RAD for redetermination. There is no question for certification proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted to a differently constituted panel for redetermination. There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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